FILED
OCT 12 2001
OFFICE OF THE CLERK

No. 01-426

IN THE

Supreme Court of the United States

KEMPER INSURANCE COMPANIES,

Petitioner,

v.

FEDERAL EXPRESS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

R. JEFFERY KELSEY*
Managing Director - Litigation
J. RUSSELL PHILLIPS
Senior Attorney
Federal Express Corp.
3620 Hacks Cross Road
Building B
Memphis, TN 38132
(901) 434-8563

* *Counsel of Record*

Attorneys for Respondent

169975

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

STATEMENT PURSUANT TO RULE 29.6

Respondent, Federal Express Corporation, is a wholly owned subsidiary of FedEx Corporation. The stock of FedEx Corporation is publicly traded on the New York Stock Exchange.

TABLE OF CONTENTS

Page

Statement Pursuant to Rule 29.6 i

Table of Contents ii

Table of Cited Authorities iii

Statement of the Case 1

Reasons for Denying the Writ 2

I. The Court of Appeals' Ruling Comports With Prior Rulings of This Court. 2

A. Courts Have Long Enforced Contractual Limitations of Liability As a Matter of Law. 2

B. The Court of Appeals Correctly Held That FedEx's Contract of Carriage Complies With The Released Value Doctrine. 4

II. Public Policy Considerations Support Enforcement of FedEx's Limit of Liability. . 8

Conclusion 10

TABLE OF CITED AUTHORITIES

Page

Cases:

American Airlines v. Wolens, 513 U.S. 219 (1995) ... 9

Carman Tool & Abrasives, Inc. v. Evergreen Lines, 871 F.2d 897 (9th Cir. 1989) 6

First Pennsylvania Bank N.A. v. Eastern Airlines, 731 F.2d 1113 (3d Cir. 1984) 3

Hampton v. Federal Express Corp., 917 F.2d 1119 (8th Cir. 1990) 7

Hart v. Pennsylvania R. Co., 112 U.S. 331 (1884) ... 3, 8

Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992) 9

National Small Shipments Traffic Conference v. Civil Aeronautics Board, 618 F.2d 819 (D.C. Cir. 1980) 3

New York, New Haven & Hartford Railroad, Co. v. Nothnagle, 346 U.S. 128 (1953) 4, 6, 7

Nippon Fire & Marine Insurance Co., Ltd. v. Skyway Freight Systems, Inc., 235 F.3d 53 (2d Cir. 2000) 3

Read- Rite Corp. v. Burlington Air Express, Ltd., 186 F.3d 1190 (9th Cir. 1999) 3, 6

Cited Authorities

	Page
Sam L. Majors Jewelers v. ABX, Inc., 117 F.3d 922 (5th Cir. 1997)	3
Travelers Indemnity Co. v. The Vessel Sam Houston, 26 F.3d 895 (9th Cir. 1994)	6
U.S. Gold Corp. v. Federal Express Corp., 719 F. Supp. 1217 (S.D.N.Y. 1989)	7
Uniden Corp. v. Federal Express Corp., 642 F. Supp. 263 (M.D. Penn. 1986)	7
Union Pacific R. Co. v. Burke, 255 U.S. 317 (1921)	6, 7
Vision Air Flight Service v. M/V National Pride, 155 F.3d 1165 (9th Cir. 1998)	6
Wagman v. Federal Express Corp., 844 F. Supp. 247 (D. Md. 1994), *aff'd*, 47 F.3d 1166 (4th Cir. 1995)	7
Zubaz, Inc. v. Federal Express Corp., 864 F. Supp. 723 (W.D. Tenn. 1994)	7
Statutes:	
49 U.S.C. § 40101	9
49 U.S.C. § 41713	9

Cited Authorities

Page

Other Authorities:

Airline Deregulation Act (1978) 3

Civil Aeronautics Act (1938) 3

Federal Aviation Act (1958) 3

Hepburn Act (1906) 3

Interstate Commerce Act (1887) 3

STATEMENT OF THE CASE

FedEx's standard contract of carriage limits its liability for loss, damage or delay of a shipment to $100 unless the shipper declares a higher value and pays a correspondingly higher transportation charge. A shipper may generally declare a value up to $50,000 per package for most commodities, but may only declare a value up to $500 for shipments of jewelry and other "items of extraordinary value" as defined in the contract.

The shipper in this case shipped eight packages of jewelry and chose not to declare a value for any of the shipments, which were lost while in FedEx's possession. Instead, the shipper accepted the $100 limit of liability and chose to transfer the risk of loss to its insurance company, Kemper, the petitioner. Kemper does not dispute the content of FedEx's contract of carriage, nor does it allege any ambiguity in the language of that contract. Rather, the petitioner asks this Court to review this case for the purpose of setting aside the contractual limit of liability by rewriting FedEx's contract for the petitioner's benefit.

The petitioner alleges that FedEx's limitation of liability is not enforceable because the $500 limit on declared value for shipments of jewelry is too low. This contention was properly rejected by the Court of Appeals which held that FedEx's limit of liability is enforceable under the released value doctrine articulated by this Court and by other federal courts.

Because the decision of the Court of Appeals was consistent with the prior rulings of this Court and numerous other federal courts, the Court should deny the writ.

REASONS FOR DENYING THE WRIT

I. The Court of Appeals' Ruling Comports With Prior Rulings of This Court.

The petitioner urges this Court to review the ruling of the Court of Appeals because that decision is inconsistent with the decisions of this Court regarding the declared value doctrine. According to the petitioner, FedEx's contract of carriage is unenforceable because the $500 limit on declared value for shipments of jewelry is too low. The petitioner then attempts to wedge this novel theory into language taken out of context from previous decisions of this Court and create a rule that FedEx can only validly limit its liability by refusing to accept goods worth more than the declared value. No such rule exists from the decisions of this, or an other, Court. In fact, the petitioner has not cited a single case from any jurisdiction where the carrier's limit of liability was held unenforceable because the upper limit of declared value was too low.

A. Courts Have Long Enforced Contractual Limitations of Liability As a Matter of Law.

For more than a century, courts have enforced limitations of carriers' liability because such limitations reflect the realities of commercial transport. The carrier, in return for offering reasonable shipping rates, is allowed to limit its liability for any damages arising out of the shipment. As this Court has explained:

> There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight

> on the assertion and agreement that its value is a lesser sum than that claimed after loss. It is just to hold the shipper to his agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier. The effect of the agreement is to cheapen the freight and secure the carriage, if there is no loss; and the effect of disregarding the agreement, after a loss, is to expose the carrier to a greater risk than the parties intended he should assume.

Hart v. Pennsylvania R. Co., 112 U.S. 331, 340 (1884).

This doctrine, commonly referred to as the released value or declared value doctrine, was subsequently incorporated into federal statutes regulating common carriers (*i.e.*, the Interstate Commerce Act (1887), the Hepburn Act (1906), the Civil Aeronautics Act (1938) and the Federal Aviation Act (1958)). The doctrine expressly governed the liability of carriers for air cargo shipments covered by the Federal Aviation Act of 1958 until the Act's repeal. While the Airline Deregulation Act of 1978 terminated the regulatory powers of the Civil Aeronautics Board, including the authority to approve rates and regulate damage claim procedures, (*see, e.g.*, *National Small Shipments Traffic Conference v. Civil Aeronautics Board*, 618 F.2d 819 (D.C. Cir. 1980)), it is well settled throughout the federal circuits that the declared value principle survived deregulation as part of the federal common law of air carrier liability. *See, e.g.*, *Nippon Fire & Marine Insurance Co., Ltd. v. Skyway Freight Systems, Inc.*, 235 F.3d 53, 59 (2d Cir. 2000); *Read- Rite Corp. v. Burlington Air Express, Ltd.*, 186 F.3d 1190, 1195 (9th Cir. 1999); *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922 (5th Cir. 1997); *First Pennsylvania Bank N.A. v. Eastern Airlines*, 731 F.2d 1113 (3d Cir. 1984).

B. The Court of Appeals Correctly Held That FedEx's Contract of Carriage Complies With The Released Value Doctrine.

The petitioner asserts that FedEx's limitation of liability does not comply with the released value doctrine and that the Court of Appeals erred in upholding the limit of liability. In fact, the Court of Appeals correctly stated the test for enforcement of a carrier's limit of liability and correctly held that FedEx's limit of liability is enforceable under established federal common law. If a carrier wishes to limit its liability, its contract must offer the shipper: (1) reasonable notice of the limit of liability; and (2) a fair opportunity to purchase higher liability. *See New York, New Haven & Hartford Railroad, Co. v. Nothnagle*, 346 U.S. 128, 135 (1953).

FedEx has clearly met the test in *Nothnagle* for an enforceable limit of liability in its shipping contract. The applicable Federal Express Service Guide, incorporated into the contract of carriage by reference, advised the shipper of FedEx's limit of liability:

> ***Declared Value and Limits of Liability***
>
> A. The declared value of any shipment represents our maximum liability in connection with a shipment, including, but not limited to any loss, damage, delay, misdelivery, nondelivery, misinformation or any failure to provide information.
>
> Exposure to and risk of any loss in excess of the declared value is either assumed by the shipper or transferred by the shipper to an insurance carrier through the purchase of an insurance policy. You

should contact an insurance agent or broker if insurance coverage is desired. WE DO NOT PROVIDE INSURANCE OF ANY KIND.

B. Our liability with regard to any package is limited to the sum of $100 unless a higher value is declared on the airbill for the package at time of tender, and a greater charge paid as provided in paragraph (C) below. . . .

* * *

D. . . . If no value is declared, the declared value and our liability will be limited to the actual value or $100, whichever is less.

* * *

Liabilities Not Assumed

WE WILL NOT BE LIABLE FOR ANY DAMAGES, WHETHER DIRECT, INCIDENTAL, SPECIAL OR CONSEQUENTIAL, IN EXCESS OF THE DECLARED VALUE OF A SHIPMENT, WHETHER OR NOT WE KNEW OR SHOULD HAVE KNOWN THAT SUCH DAMAGES MIGHT BE INCURRED, INCLUDING, BUT NOT LIMITED TO LOSS OF INCOME OR PROFITS.

(Emphasis in original).

Kemper concedes that the shipper had sufficient notice that the $100 limit of liability would apply unless the shipper chose to declare and pay for a higher value. Kemper does

not dispute that the shipper was given the opportunity to declare a higher value — up to $500 for shipments of jewelry[1].

The plaintiff alleges, however, that FedEx's limit of liability is not enforceable because FedEx limits the declared value on shipments of jewelry to $500. The Court of Appeals considered Kemper's argument and properly rejected it because Kemper misconstrues the released value doctrine to require the carrier to accept unlimited liability or to limit the value of commodities it accepts. Under this theory even FedEx's standard $50,000 limit on declared value would be insufficient. The plaintiff has not cited, and counsel for FedEx is not aware of, a single case where an air carrier's limit of liability has been set aside because the upper limit for declared value was too low.

The petitioner alleges that *Union Pacific R. Co. v. Burke*, 255 U.S. 317 (1921) and *New York, New Haven & Hartford Railroad, Co. v. Nothnagle*, 346 U.S. 128, 135 (1953) provide a basis for holding FedEx's limit of liability unenforceable. To the contrary, these cases set forth the proper rule for enforcement of a valid limit of liability, but the liability limitation was not enforceable under the facts of the particular case. In *Burke*, the carrier's limit of liability was unenforceable because the railroad did not provide any

---

1. Some courts have held that the shipper's decision to buy private insurance evidences a conscious decision to accept the carrier's liability limitation. *Read-Rite Corp. v. Burlington Air Express, Ltd.*, 186 F.3d 1190, 1198, *citing*, *Vision Air Flight Service v. M/V National Pride*, 155 F.3d 1165, 1169 (9th Cir. 1998); *Travelers Indemnity Co. v. The Vessel Sam Houston*, 26 F.3d 895, 900 (9th Cir. 1994); *Carman Tool & Abrasives, Inc. v. Evergreen Lines*, 871 F.2d 897, 901 n.10 (9th Cir. 1989).

opportunity to declare a value higher than the $100 default liability. *Burke*, 255 U.S. at 323. By contrast, FedEx's contract of carriage complies with the declared value doctrine because it gives the shipper the opportunity to declare a value up to $500 for shipments of jewelry. In *Nothnagle*, the carrier's limit of liability was held unenforceable because the shipper had no notice of the limitation. 346 U.S. at 136. The shipper simply handed her baggage to a porter and did not receive any documentation in return. 346 U.S. at 129. In this case, the petitioner concedes that the shipper had notice of the limit of liability. The Court of Appeals' decision in this case is entirely consistent with the declared value doctrine articulated in *Burke* and *Nothnagle*.

Likewise, the Court of Appeals' decision is consistent with other federal courts which routinely uphold FedEx's contractual limitation of liability and limit a claimant's damages to $100 for lost, damaged or delayed shipments. *Wagman v. Federal Express Corp.*, 844 F. Supp. 247 (D. Md. 1994), *aff'd*, 47 F.3d 1166 (4th Cir. 1995) (lawsuit delivered late, $100 limit of liability enforced); *Hampton v. Federal Express Corp.*, 917 F.2d 1119 (8th Cir. 1990) (blood samples contaminated, limit of liability enforced); *Zubaz, inc. v. Federal Express Corp.*, 864 F. Supp. 723 (W.D. Tenn. 1994); *U.S. Gold Corp. v. Federal Express Corp.*, 719 F. Supp. 1217 (S.D.N.Y. 1989) (gold grain); *Uniden Corp. v. Federal Express Corp.*, 642 F. Supp. 263 (M.D. Penn. 1986) (performance bond for bid; $100 limit of liability enforced).

The Court of Appeals correctly held that any damages which the plaintiff might recover are limited to $100 per shipment under the contracts of carriage which notified the shipper that FedEx's liability was limited to $100 unless a higher value was declared. That same contract also notified the shipper that FedEx

does not provide insurance of any kind and that the shipper should transfer the risk of loss to an insurer if enhanced protection was warranted. The shipper accepted FedEx's limited liability (and its corresponding lower transportation charge) and transferred the risk of loss to its insurance carrier, Kemper. The petitioner should not be allowed to set aside this valid contractual limitation agreed to by FedEx and the shipper.

II. Public Policy Considerations Support Enforcement of FedEx's Limit of Liability.

The petitioner alleges that the Court of Appeals ruling changes the jurisprudence governing the carriage of cargo, and that the shipping public will be harmed by the consequences of the decision. As established above, the decision below does not effect any change in the released value doctrine. The policy considerations raised by the plaintiff, moreover, have been incorporated into the evolution of the released value doctrine. As this Court eloquently stated over a century ago:

> It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper would be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in the case of loss.

Hart v. Pennsylvania R. Co., 112 U.S. 331, 341 (1884). The petitioner's attempt to set aside the limit of liability in this case is repugnant to the public policy evidenced in the declared value doctrine.

The petitioner's policy argument also conflicts with Congress' expressed intention of allowing market forces to govern the rates of air carriers. The petitioner implies that shippers have no choice but to accept FedEx's contract. In fact, shippers have many choices of carriers to transport their shipments, and are free to use them if FedEx's contract terms are too burdensome. If enough shippers abandon FedEx's services because of its proffered contract terms, FedEx will undoubtedly change its contract to attract new customers. Such market mechanisms — not judicial intervention — are the proper method of "regulating" an air carrier's rates. As this Court has recognized, Congress expressed its intent to allow market forces to govern the rates of air carriers through the Airline Deregulation Act, 49 U.S.C. § 41713. *American Airlines v. Wolens*, 513 U.S. 219 (1995) *citing*, *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992); *see also* 49 U.S.C. § 40101 where Congress mandated "maximum reliance on competitive market forces" in the regulation of airlines. Consistent with this reliance on market forces, this Court has held that the ADA confines courts in breach of contract actions to enforcing the parties' bargain with no enlargement based on state laws or policies external to the agreement. *Wolens*, 513 U.S. at 223. The petitioner urges this Court to accept this case for the purpose of redrafting the plain language of the contract of carriage and setting aside FedEx's limit of liability. The Court should deny the petition, and thereby confine the petitioner to the terms of the contract as written.

CONCLUSION

The decision of the Court of Appeals is consistent with federal law enforcing the limitations of liability in air carriers' contracts, and is consistent with Congress' intent to allow market forces to regulate the rates of air carriers. The petition for writ of certiorari should be denied.

Respectfully submitted,

R. JEFFERY KELSEY*
Managing Director - Litigation
J. RUSSELL PHILLIPS
Senior Attorney
Federal Express Corp.
3620 Hacks Cross Road
Building B
Memphis, TN 38132
(901) 434-8563

Attorneys for Respondent

* *Counsel of Record*